IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 225 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABUBHAI KALABHAI KATARA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 225 of 1998
MS BANNA S DUTTA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR AY KOGJE APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 17/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. Against the impugned judgment and order of conviction and sentence dated 24.4.1998 passed by the Additional Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No.25 of 1997 convicting the appellant-accused for the offence under Section 302 IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.4,500/= in default to further undergo 2 years SI and also convicting him for the offence under Sec.135 of Bombay Police Act and sentencing him to suffer 4 months RI and to pay fine of Rs.100/= in default to further undergo 15 days SI, the appellant-accused has filed this appeal through jail. Learned counsel, Ms.Banna Datta was appointed as counsel to defend his case in this appeal.

#. It is the prosecution case that complainant-Arvindbhai Katara was staying at village Dhundhera of taluka Meghraj. He is an agriculturist. He has three brothers and two sisters. He is the eldest son. Bhikhabhai is younger to him and Babubhai is the youngest one. Both his sisters got married. His father had also got second marriage with the sister of his first wife. Out of second marriage his father had one son and two daughters. Complainant-Arvindbhai and Babubhai were staying together. Complainant is married. He got three sons and one daughter. Bhikhabhai, brother of the complainant got married with Maniben daughter of Segabhai Somabhai of village Vaniavada. He had two sons. Babubhai was unmarried and staying with his elder brother-complainant-Arvindbhai. Before one and half month of the incident, he came to village and staying with the complainant. Land of the complainant is of joint family property and there was no partition made by his father.

On the evening of 10.11.1996 Babubhai, brother of the complainant Arvindbhai had gone to village Panchal for bringing sugar, kerosene etc. He came late in the evening. He was telling that he will not allow anyone to have share from his land including Bhikhabhai. That time Bhikhabhai came to his house. All of a sudden Babubhai told the complainant that due to Diwali he had to go to village Itwa to meet the family members and left. At that time complainant and his brother Bhikhabhai told him not to go because it was night time. But he did not pay any heed. Thus, all three brothers were going towards their another house on "kutchcha" road where again Babubhai told Bhikhabhai and complainant that they will

not get anything out of the agricultural income. Thereupon, altercation took place between Bhikhabhai and Babubhai and because of that Babubhai all of a sudden got excited and gave knife blow on the left side of his neck and because of that Bhikhabhai fell on the ground. On raising shouts by the complainant, Babubhai ran towards Panchal village. On hearing the shouts his father; his mother-in-law Jamliben; his wife Savitaben; Maniben, wife of Bhikhabhai and her mother Thavriben have come to the place of incident. That time blood was coming out from the neck of Bhikhabhai. He was unable to speak and complainant found him dead. The incident in question took place at about 8.00 p.m. on 10.11.1996. It was night time, therefore, he could not get any vehicle, therefore, on the next day morning i.e. on 11.11.1996 he had gone to the police station and lodged FIR. After arresting the accused, police filed charge sheet against the accused before the Magistrate, who in turn committed case against accused to the court of Sessions. The learned Sessions Judge framed charge at Ex.3 against the accused for committing murder of his brother Bhikhabhai on 10.11.1996 at 8.00 p.m. by giving knife blow on his neck. The accused did not plead guilty to the charge and came to be tried, therefore, the prosecution examined, in all, 12 witnesses in support of its case, which includes complainant, eye witness, Medical Officer, I.O. etc. The defence of the accused was of total denial and according to him false case was filed against him and that he had not committed any offence, as alleged.

After considering the evidence of the prosecution witnesses, the learned Judge came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt and, therefore, he convicted the accused for the offence under Section 302 for committing murder of his brother Bhikhabhai and sentenced him to suffer life imprisonment and to pay fine of Rs.4,500/= in default to further undergo two years S.I. The said amount was ordered to be paid to Maniben, widow of deceased-Bhikhabbhai. The learned Judge also convicted the accused for the offence under section 135 of the Bombay Police Act and sentenced him to suffer four months RI and to pay fine of Rs.100/= in default to further undergo 15 days SI. Both the sentences were ordered to run concurrently. The learned Judge also gave set of to the accused during which period he remained in jail as under-trial prisoner. This impugned judgment and order of conviction and sentence passed by the learned Judge is under challenge in this appeal.

#. Learned counsel Ms.Datta for the appellant-accused

vehemently submitted that the learned Judge wholly erred in convicting the appellant-accused on the sole testimony of Maniben, widow of deceased-Bhikhabhai, when all the other prosecution witnesses turned hostile. She submitted that Maniben could not have witnessed the incident because at the time of incident except those three brothers; (1) complainant-Arvindbhai; (2) accused-Babubhai and (3) deceased-Bhikhabhai, no one else was present there and the incident took place on "kutchcha" road in the night time, therefore, it would not be possible for Maniben to see the accused giving blow with knife on the neck of the deceased. She also submitted that Maniben being the widow of the deceased-Bhikhabhai she would be naturally interested in securing the conviction of the appellant-accused and when there is no independent witness coming forward, then the court should not have based the conviction on her sole interested testimony. However, learned APP, Shri Kogje submitted that the learned Judge has not committed any error in convicting the accused for committing murder of deceaed-Bhikhabhai. He has submitted that though Maniben was interested witness, there was nothing wrong on the part of the learned Judge to convict the accused on her sole testimony as her evidence is not at all shaken in her cross-examination. Her presence at the place of incident was natural and except relatives of the deceased no independent witness would be there.

#. It is true that in the instant case, the complainant has turned hostile may be because he is the real brother of the accused and that he has already lost his another brother in the incident. Therefore, when the complainant and other witnesses, who were also closely related to the accused, have turned hostile, then we are required to closely scrutinise the evidence of sole prosecution witness Maniben, who has deposed against the accused. Maniben widow of deceased-Bhikhabhai PW-2 Ex.9 stated in her evidence before the court that on the day of incident accused was staying separately from her husband. It was day of Diwali, therefore, he was at her home. Her husband had gone to the house of her step-mother. Accused and Arvindbhai followed her husband. All the three brothers had gone to their step-mother's house. Thereafter, accused came to the house of her mother-in-law and left by saying that he had to go to village "Itwa". Complainant-Arvindbhai and her husband, deceased Bhikhabhai followed the accused. Thereafter, accused and complainant started quarrelling with each other. She had also followed her husband. Accused gave knife blow on the neck of her husband, which was seen by her with her own eyes. Because of the knife blow her

husband fell down. Blood was coming out from his neck. Accused ran away towards east after going to the house of her mother-in-law. Her husband was cultivating land and her mother-in-law was telling them that they had not to take crop from her field, therefore, she was staying separately with her husband and bringing food grains from her father's house. Her husband was sowing their land. When complainant-Arvindbhai had gone to sell "Adad" (blackgram) at that time the accused demanded his share from it. Thereupon, complainant told her husband that the accused was demanding his share. Accused ran away after the incident. She had identified accused as well as muddamal knife, which was used by the accused for giving blow to her husband. In her cross-examination, she denied that on the day of incident she had gone to village. However, she admitted that there was no light in her village. She stated that the incident took place in the field, which was at a distance of 200-250 feet from her house. There are 2-3 fields in between the place of incident and her house. She also denied that she had not seen the incident. She also denied any statement made before the police that at about 8.00 p.m. in the night on hearing shouts of Arvindbhai her brother-in-law near the house of her mother-in-law, Jamliben, "run run", she had gone there running. However, immediately thereafter she admitted that she had stated the same before the police in her statement. Thereafter, on her own she stated that while running she had witnessed the incident. She has also stated in her cross-examination that at the time of incident, the accused and the complainant consumed alcohol, but her husband had not. She also denied that the incident in question took place because the case was filed against her husband for consuming alcohol. She also denied that her husband was fully drunk, therefore, he fell down on the ground and received Dharia injuries in the field.

#. From the above evidence of Maniben, it is clear that she may not have actually remained present at the place of incident, but from a distance she must have seen the accused giving knife blow to her husband on his neck. Her evidence in Chief that after all the brothers left the house on the way on "kutchcha" road accused and complainant started quarrelling, therefore, she was following her husband. This evidence has not been controverted in her cross-examination. Thus, we are fully convinced that Maniben must have witnessed the incident from a short distance. Presence of Maniben at the place of incident is duly corroborated by the evidence of complainant-Arvindbhai PW-1 Ex.6, who has clearly stated that on raising shouts Maniben, widow of

Bhikhabhai immediately came there. Admittedly, the place of incident was hardly at a distance of 200-250 ft. from the house of witness-Maniben. Thus, we have no hesitation in holding that Maniben must have witnessed the incident, therefore, it cannot be said that the learned Judge has committed any error in convicting the accused.

#. Learned counsel Ms.Datta for the appellant-accused then submitted that the learned Judge ought not to have convicted the appellant-accused for the major offence under Section 302 IPC. She submitted that even if the evidence of Maniben, widow of deceased-Bhikhabhai found to be reliable for convicting the accused, then also accused could not be convicted for the major offence under Section 302 IPC. She submitted that at the most the accused could have been convicted for the offence under Section 304 Part-I IPC, but the learned Judge has not at all considered this in his impugned judgment. Ms.Datta submitted that it is clear from the evidence of prosecution witnesses, including Maniben PW-2 Ex.9 and the complainant that the incident in question took place because of grave and sudden provocation and because of that the accused got excited and gave only one knife blow on the neck of the deceased and thereafter ran away. Thus, the case of the appellant-accused falls under exception 1 of Section 300 IPC, therefore, the appeal be partly allowed by quashing and setting aside the order of conviction passed by the learned Judge convicting the appellant-accused for the offence under Section 302 IPC and altering it under Section 304 Part-I IPC. On the facts of this case, learned APP, Shri Kogje was hardly in a position to oppose this. Having carefully considered the evidence of the prosecution witnesses, including evidence of Maniben PW-2 and complainant-Arvindbhai PW-1 we are of the opinion that this is not a case in which the accused can be convicted for the major offence under Section 302 IPC and he can be convicted for the offence under Section 304 Part-I IPC.

#. The impugned judgment and order of conviction passed by the learned Sessions judge convicting the appellant-accused for the offence under Section 135 of Bombay Police Act is not required to be disturbed.

#. In view of the above discussion, this appeal is partly allowed and the impugned judgment and order of conviction and sentence dated 24.2.1998 passed by the learned Addl. Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No.25/97 convicting the appellant-accused for the offence under Section 302 IPC

is hereby altered to Section 304 Part-I IPC and the appellant-accused is ordered to suffer rigorous imprisonment for 10 years. He will be entitled for set off. Order of conviction and sentence passed by the learned Additional Sessions Judge, convicting the appellant-accused for the offence under Section 135 Bombay Police Act is maintained. However, both the substantive sentences are ordered to run concurrently.

(B.J.Shethna, J.)

(M.S.Shah, J.)

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